

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

PACIFICORP, Plaintiff

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.

COMPLAINT

Plaintiff PacifiCorp (“PacifiCorp” or “Plaintiff”) brings this action against the Defendant United States Environmental Protection Agency (“EPA” or “Defendant”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, et seq. As set forth below, pursuant to FOIA PacifiCorp seeks records from EPA relating to EPA’s rulemaking under a specific Federal Clean Air Act (“CAA”) program, 42 U.S.C. § 7401 et seq. PacifiCorp alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff PacifiCorp is an electric utility company that supplies electricity to more than 1.8 million residential and business customers in six western states, with its principal place of business in Portland, Oregon.

2. EPA is an agency of the United States Government. Defendant EPA’s Region 8 headquarters office is located at 1595 Wynkoop Street Denver, CO 80202. EPA Region 8

includes Wyoming among other states. On information and believe, Defendant has possession, custody and control of the records to which Plaintiff seeks access.

3. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552(a)(4)(A)(vii). This Court also has jurisdiction over this action pursuant to U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

4. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

GENERAL ALLEGATIONS

FOIA Background

5. FOIA requires agencies of the federal government to release requested records to the public unless one or more statutory exemptions apply. *See* 5 U.S.C. §552(b)(6)

6. When making a FOIA request, the requesting party must “reasonably describe such records” requested. 5 U.S.C. § 552(a)(3).

EPA’s FOIA regulations state that requesting parties: should reasonably describe the records [they] are seeking in a way that will permit EPA employees to identify and locate them. Whenever possible, [the requestor] should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, [the requestor] should include any file designations or descriptions for the records [requested]. The more specific [the requestor is] about the records or type of records [requested], the more likely EPA will be able to identify and locate records responsive to [the] request.

40 C.F.R. § 2.102

EPA’s Action on Wyoming’s Regional Haze Implementation Plan.

7. At issue in this Complaint are records PacifiCorp has requested from EPA that pertain to EPA’s actions in connection with Wyoming’s regional haze implementation plan.

8. The “Regional Haze Program” is part of the CAA. It requires States to create and adopt implementation plans to evaluate and potentially reduce haze-causing emissions from sources within the State.

9. States are required to submit their regional haze implementation plans (“RH SIPs”) to EPA. EPA is first required to determine whether the RH SIP is administratively complete within six months of submittal. EPA then must issue a formal rulemaking to approve or disapprove (or partially approve or disapprove) each RH SIP within twelve months of determination that the SIP submission is administratively complete.

10. Pursuant to the Regional Haze Program, Wyoming developed a RH SIP and submitted it to EPA for the first time on November 21, 2008. Wyoming submitted a revision to its RH SIP on January 12, 2011.

11. As of January 2, 2011, however, EPA had not taken any action on Wyoming’s RH SIP, in addition to failing to act on other RH SIPs submitted by other States. To compel EPA to act, environmental groups (“Environmental Plaintiffs”) filed a Complaint in the United States District Court for the District of Colorado seeking declaratory and injunctive relief pursuant to the CAA and demanding that the EPA Administrator act on the submitted RH SIPs. *WildEarth Guardians v. Jackson*, Case No. 11-cv-0001 (D. Colo. filed January 2, 2011).

12. On March 30, 2011, Environmental Plaintiffs filed a First Amended Complaint in which they asked the Court to compel EPA to act on Wyoming’s RH SIP submission. EPA did not notify Wyoming or any of the other States with RH SIPs that were the subject of the lawsuit.

13. Environmental Plaintiffs and EPA, however, agreed to a series of deadlines by which time EPA would act on Wyoming and the other State’s RH SIPs. The agreement was

memorialized in a Consent Decree, which was entered by the Court on June 6, 2011, and the litigation was stayed.

14. Pursuant to the Consent Decree, EPA agreed and promised to issue a proposed rulemaking as to Wyoming's RH SIP by April 15, 2012. (Consent Decree ¶ 6.) EPA agreed and promised to issue a final rulemaking as to Wyoming's RH SIP by October 15, 2012. (Id. ¶ 7.) Again, EPA agreed to all of this without consulting with, or even informing, the affected states, such as Wyoming, or the affected industries, such as PacifiCorp.

15. On January 10, 2012, Environmental Plaintiffs and EPA agreed to extend the deadline to May 15, 2012 by which EPA must issue its proposed rulemaking as to Wyoming. (Stipulated Extension at ¶ 2.) EPA again agreed to all of this without notifying or consulting with the State of Wyoming or PacifiCorp.

16. On May 15, 2012, EPA issued an informal proposed ruling on Wyoming's RH SIP, which was published in the Federal Register on June 4, 2012. 77 Fed. Reg. 33,022. EPA proposed to partially approve and partially disapprove Wyoming's RH SIP, and also proposed a federal implementation plan ("FIP") for those portions of the disapproved RH SIP. EPA's FIP required the installation of additional expensive and unnecessary pollution control equipment.

17. The publication of EPA's proposed rule in the Federal Register opened the 60-day public comment period. PacifiCorp, the State of Wyoming, and other parties affected by Wyoming's RH SIP and EPA's proposed rulemaking submitted public comments within the proscribed period.

18. EPA did not, however, issue a final rulemaking by the deadline of October 15, 2012 as agreed in the Consent Decree. Instead, on October 3, 2012, Environmental Plaintiffs

and EPA entered into a second stipulation to extend the deadlines contained within the Consent Decree.

19. On December 10, 2012, EPA submitted an unopposed motion to modify the Consent Decree to extend the deadlines in connection with the Wyoming RH SIP a third time. EPA identified several reasons in its motion for its “re-proposal” and the additional extension: (1) it had conferred with representatives for the Environmental Plaintiffs about the modification; (2) public comments prompted EPA to undertake additional research; (3) EPA developed “substantial new cost and visibility analyses;” and that (4) EPA believed that this “new information” “is significant and the public...should have the opportunity to comment on the new information.”

20. EPA’s motion proposed that EPA would complete its “re-proposal” by March 29, 2013 and to complete its final rulemaking by September 27, 2013.

21. Prior to submitting this unopposed motion, EPA did not notify or consult with any of the parties, including PacifiCorp, that submitted public comments in response to EPA’s June 4, 2012 published proposed rulemaking . Furthermore, EPA developed this “substantial new cost and visibility analyses” without consulting with either the State of Wyoming or PacifiCorp, despite the fact that EPA was using this information to evaluate, and reject Wyoming’s RH SIP with the substantial impact such action may have on PacifiCorp’s power plants located in Wyoming.

22. There is no clear provision in the regional haze statutes or regulations, or under the CAA, that permits EPA to “re-propose” a rule that it has already submitted for public comment.

23. The Environmental Plaintiffs and EPA next stipulated to a fourth extension relating to the Wyoming RH SIP on March 25, 2013 in which the Parties agreed to extend EPA's deadline to sign its notice of its "re-proposed" rulemaking by May 23, 2013. Again, EPA did not notify or consult with the state of Wyoming or PacifiCorp in regard to agreeing to this extension.

24. EPA published its "re-proposed" rulemaking in the Federal Register on June 10, 2013. 77 Fed. Reg. 34,737 (June 10, 2013) ("Wyoming RH Re-proposal"). In the Wyoming RH Re-proposal, EPA disapproved more of Wyoming's RH SIP than it had originally disapproved and required, through a revised FIP, much more expensive, and unnecessary, pollution control equipment at PacifiCorp's Wyoming power plants.

25. In the Wyoming RH Re-proposal, EPA based its FIP requirement to install additional pollution control equipment on the "substantial new cost and visibility analyses" it had apparently conducted after it issued its original proposed rulemaking and that it had offered as the reason it needed an extension to issue a "re-proposal".

26. The public comment period for the Wyoming RH Re-proposal also opened upon the publication in the federal register. The deadline for public comment on the Wyoming RH Re-proposal is August 26, 2013.

27. PacifiCorp needs the information it requested in its FOIA Requests that are at issue here in order to prepare its public comments to the Wyoming RH Re-proposal. For example, PacifiCorp needs the information about the "substantial new cost and visibility analyses" that EPA conducted and which it used as the basis to require the expensive additional emissions controls. Also, PacifiCorp wants to understand what discussions took place between

Environmental Plaintiffs and EPA that influenced the new requirements for additional control equipment.

28. The public comment period is PacifiCorp's only opportunity to provide feedback and articulate a response to the Wyoming RH Re-proposal. If PacifiCorp is required to submit public comments without the information requested in its FOIA Requests, it could be denied due process and any opportunity to meaningfully respond or challenge the substantial obligations that will be imposed on it through the Wyoming RH Re-proposal.

PacifiCorp's First FOIA Request.

29. PacifiCorp submitted its first public records request to EPA on January 17, 2013 (the "First FOIA Request"). (A copy of PacifiCorp's First FOIA Request is attached hereto as Exhibit A.)

30. In its First FOIA Request, PacifiCorp sought the "new information" EPA referred to in its motion seeking the opportunity to issue a "re-proposal" for Wyoming's RH SIP in addition to the correspondence regarding the re-proposal and related extensions that EPA had with the Environmental Plaintiffs.

31. On February 21, 2013, EPA produced 41 documents and withheld 336 documents. In the enclosure letter, EPA characterized its response as the "first phase of EPA's initial response" to PacifiCorp's First FOIA Request. (A copy of EPA's February 21, 2013 Letter Response is attached as Exhibit B.)

32. EPA stated that it withheld the 336 documents pursuant to "5 U.S.C. 555(b) (Exemption 2-High and Exemption 5- Deliberative Process, Attorney Work Product, and Attorney Client Privilege)." EPA provided a simple table that summarized the number of

documents it withheld pursuant to three of the exemptions claimed. It did not provide a basis or explanation as to why the exemption claimed applied to any individual document.

33. On March 19, 2013 PacifiCorp responded to EPA's February 21, 2013 letter. PacifiCorp objected to the descriptions and detail that EPA provided as to the basis for withholding the 336 documents. On March 21, 2013, PacifiCorp also appealed EPA's decision to withhold these documents to the National Freedom of Information Officer. (A copy of PacifiCorp's March 19, 2013 Letter Response is attached as Exhibit C; A copy of PacifiCorp's March 21, 2013 Appeal is attached as Exhibit D.)

34. On March 29, 2013, EPA responded to PacifiCorp's March 19, 2013 letter. EPA provided a more detailed description as to the basis for the exemption pursuant to which it withheld the 336 documents, but the description in many cases was still deficient. (A copy of EPA's March 29, 2013 Letter Response is attached as Exhibit E.) For example, although EPA described its first response to PacifiCorp's First FOIA Request as the "first phase of EPA's initial response," EPA did not produce any additional documents in connection with its March 29, 2013 response. Despite again referring to its March 19, 2013 production as the "first phase" of its response, EPA has still not produced any additional documents.

35. EPA also failed to properly document the exemptions on which it relied to withhold documents. As described in PacifiCorp's appeal, EPA failed to do the following:

- a. With regard to documents EPA withheld pursuant to Exemption 5-Attorney-client Privilege, EPA failed to identify that these documents related to a legal matter or contained confidential communications by an attorney. Specifically, EPA did not meet this burden for at least the documents it

numbered 4, 19, 25,31-32,35-45,47-51, 54-55, 57, 67, 94, 98- 100, 107, 110-111, 115, 122, 124, 131- 133, 135-136, 138, 140- 143, 145, 152- 153, and 159-166.

b. With regard to documents EPA withheld pursuant to Exemption 5 – Attorney Work Product, EPA has not shown the documents it withheld on this basis were prepared based on concrete facts that would likely lead to litigation and also were not otherwise shared with third parties. Specifically, EPA did not meet this burden for at least the documents it numbered 3, 5-19,29-65,67-70, 73, 77, 91, 94-101, 103, 107, 110- 118, 120, 122- 128, 131- 136, 138- 143, 145, 152- 155, and 159- 166.

c. With regard to documents EPA withheld pursuant to Exemption 5 – Deliberative Process, EPA has not shown that these documents contain “advisory opinions, recommendations, or deliberations that support government decision making. Specifically, EPA did not meet this burden for at least the documents it numbered 3- 5, 7- 17, 19- 28, 32-40, 42-49, 51, 53-57, 59-65, 68-74, 76-79, 84-85, 91, 94,97-106, 108-133, and 136- 166.

36. On April 29, 2013, PacifiCorp appealed EPA’s March 29, 2013 Response to the National Freedom of Information Officer and explained the deficiencies in a second appeal to the National Freedom of Information Officer. (A copy of PacifiCorp’s April 29, 2013 Appeal is attached as Exhibit F.)

37. Although PacifiCorp served its appeal on April 29, 2013, EPA’s Office of General Counsel did not acknowledge receipt of the appeal until May 29, 2013. (A copy of the

acknowledgement is attached as Exhibit G.) Inexplicably, EPA has not taken any further action with respect to the appeal.

PacifiCorp's Second FOIA Request.

38. On April 4, 2013, PacifiCorp filed a second FOIA Request (“Second FOIA Request”) seeking information about EPA and the Environmental Plaintiffs’ March 25, 2013 stipulation in which they agreed to extend the deadline by which EPA would issue its “re-proposal.” (A copy of PacifiCorp’s Second FOIA Request is attached as Exhibit H.)

39. On May 3, 2013, EPA provided PacifiCorp with its “initial response” to PacifiCorp’s Second FOIA Request and produced four documents. (A copy of EPA’s May 3, 2013 Letter Response is attached as Exhibit I.)

40. On May 29, 2013, EPA provided PacifiCorp with its “completed response” to PacifiCorp’s Second FOIA Request. Specifically, EPA produced four additional documents and withheld 35 documents pursuant to Exemption 5-Attorney Client Privilege and 11 documents pursuant Exemption 5-Deliberative Process Privilege. (A copy of EPA’s May 29, 2013 Letter Response is attached as Exhibit J.)

41. EPA did not explain how the two exemptions it claimed applied to any of the 46 documents individually. Instead, EPA provided a generic description as to the contents of the 35 documents withheld pursuant to Exemption 5-Attorney Client Privilege and the 11 documents pursuant Exemption 5-Deliberative Process Privilege.

42. EPA also provided an invoice dated June 6, 2013, in which it stated it spent .5 hours searching for records responsive to the Second FOIA Request and .75 hours reviewing records. (A copy of the June 5, 2013 Invoice is attached hereto as Exhibit K.)

43. On June 25, 2013, PacifiCorp appealed EPA's May 3 and May 29, 2013 Response to its Second FOIA Request to the National Freedom Information Officer. PacifiCorp appealed EPA's failure to establish the exemption applicable to each document it withheld. (A copy of PacifiCorp's June 25, 2013 Appeal is attached as Exhibit L.)

44. EPA's Office of General Counsel acknowledged receipt of the appeal on June 26, 2013. (A copy of the acknowledgement is attached as Exhibit M.) EPA also has not taken any further action with respect to this appeal.

PACIFICORP'S CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(Failure to Produce Records – First FOIA Request)

45. PacifiCorp re-alleges and incorporates by reference all preceding paragraphs.

46. Defendant is unlawfully withholding records requested by PacifiCorp pursuant to 5 U.S.C. § 552.

47. In its First FOIA Request, PacifiCorp properly asked for specific records within the custody and control of EPA. PacifiCorp's First FOIA Request was not overbroad and stated with specificity the types of records sought in such a way that would "permit EPA employees to identify and locate" the requested records. U.S.C. § 552(a)(3), 40 C.F.R. § 2.102.

48. EPA violated FOIA's mandate to release agency records to the public by failing to release the records as specifically requested. U.S.C. §§ 552(a)(3)(A), 552(a)(3)(B). EPA's

attempts to justify, through various FOIA exemptions, its withholding of documents is improper because the exemptions are inapplicable, and EPA has failed to properly support its exemption claims.

SECOND CAUSE OF ACTION
(Failure to Produce Records – Second FOIA Request)

49. PacifiCorp re-alleges and incorporates by reference all preceding paragraphs.

50. Defendant is unlawfully withholding records requested by PacifiCorp pursuant to 5 U.S.C. § 552.

51. In its Second FOIA Request, PacifiCorp properly asked for specific records within the custody and control of EPA. PacifiCorp's First FOIA Request was not overbroad and stated with specificity the types of records sought in such a way that would "permit EPA employees to identify and locate" the requested records. U.S.C. § 552(a)(3), 40 C.F.R. § 2.102.

52. EPA violated FOIA's mandate to release agency records to the public by failing to release the records as specifically requested. U.S.C. §§ 552(a)(3)(A), 552(a)(3)(B). EPA's attempts to justify, through various FOIA exemptions, its withholding of documents is improper because the exemptions are inapplicable, and EPA has failed to properly support its exemption claims.

53. EPA failed to conduct a thorough search for all responsive records in response to PacifiCorp's Second FOIA Request because, among other reasons, it spent just 1.25 hours searching and reviewing records.

THIRD CAUSE OF ACTION
(Declaratory Relief)

54. PacifiCorp re-alleges and incorporates by reference all preceding paragraphs.

55. There is an actual controversy between PacifiCorp and EPA that is within the jurisdiction of this Court.

56. PacifiCorp has a right to receive the documents requested in its First and Second FOIA Requests pursuant to 5 U.S.C. § 552.

57. EPA has withheld documents and records that are responsive to the First and Second FOIA Requests. For example, EPA has withheld at least 337 documents based on its assertion of Exemption 5-Attorney Work Product, Exemption 5-Attorney Client Privilege and Exemption 5-Deliberative Process Privilege. 5 U.S.C. § 552(b)(5).

58. EPA must provide a description as to why the claimed exemption applies to each document, or portions of each document, that it withholds.

59. EPA has not, however, provided an adequate explanation as to the basis for withholding each individual document pursuant to the claimed exemption.

60. EPA also stated that it produced documents only as to the “initial phase” of its response to PacifiCorp’s First FOIA Request. It has not produced any documents as part of the second phase or otherwise completed its production of documents responsive to the First FOIA Request.

61. Declaratory relief finding EPA in violation of 5 U.S.C. § 552 is appropriate pursuant to 28 U.S.C. § 2201, as is a declaration of PacifiCorp’s rights to the information and the inapplicability of the FOIA exemptions that EPA is using to hide the information.

FOURTH CAUSE OF ACTION
(Injunctive Relief)

62. PacifiCorp re-alleges and incorporates by reference all preceding paragraphs.

63. PacifiCorp has a right to receive the documents requested in its First and Second FOIA Requests pursuant to 5 U.S.C. § 552.

64. EPA has withheld documents and records that are responsive to the First and Second FOIA Requests in violation of 5 U.S.C. § 552, and as described in its First and Second Causes of Action herein.

65. PacifiCorp will be irreparably harmed if the Court does not issue an order enjoining EPA from improperly withholding documents responsive to PacifiCorp's First and Second FOIA Requests.

66. PacifiCorp will suffer irreparable harm because PacifiCorp must submit public comments on the Wyoming RH Re-proposal within a very short period of time. The documents which EPA is withholding relate to the "substantial new cost and visibility analyses" it relied on in issuing the Wyoming RH Re-proposal. The Wyoming RH Re-proposal requires PacifiCorp to install expensive emissions controls at substantial costs.

67. PacifiCorp's opportunity to preserve a challenge to the "substantial new cost and visibility analyses" and any other aspects of the Wyoming RH Re-proposal is to submit comments to EPA prior to the issuance of a final rule. As such, PacifiCorp will be deprived of its ability to challenge EPA's rulemaking if EPA is not enjoined from withholding these documents.

68. PacifiCorp is substantially likely to succeed on the merits of its claim that EPA is improperly withholding documents responsive to PacifiCorp's First and Second FOIA Requests and in violation of 5 U.S.C. § 552.

69. The harm that PacifiCorp will suffer if an injunction enjoining EPA from withholding documents is not issued outweighs the harm to EPA if an injunction is issued.

70. PacifiCorp will be harmed because it will be deprived of its right to make meaningful public comments as to the information on which EPA based its Wyoming RH Re-proposal. In comparison, EPA will not be harmed by an order enjoining it from improperly withholding this information.

71. The public interest favors an injunction. An injunction will enable PacifiCorp to submit public comments as to EPA's rulemaking.

72. For at least these reasons, PacifiCorp seeks an injunction enjoining EPA from withholding documents responsive to its First and Second FOIA Requests.

PRAYER FOR RELIEF

WHEREFORE, PacifiCorp respectfully requests that this Court:

1. Order EPA to immediately complete its search and production in response to PacifiCorp's First FOIA Request;
2. Order EPA to immediately conduct a thorough search for all responsive records in response to PacifiCorp's Second FOIA Request;
3. Order EPA to immediately disclose all records requested in the First and Second FOIA Requests in their entirety and make copies available to PacifiCorp;
4. Enter a declaration pursuant to 28 U.S.C. § 2201 stating that EPA has violated 5 U.S.C. § 552(b)(5) for improperly withholding documents responsive to PacifiCorp's First and Second FOIA Requests;
5. Enter an injunction enjoining EPA from withholding any documents on basis of the exemptions claimed;

6. Award PacifiCorp its costs and reasonable attorney fees incurred in this action under U.S.C. § 552(a)(4)(E); and

7. Grant such other and further relief as the Court may deem just and proper.

DATED this 15th day of August, 2013.

/s/ Gregory J. Savage

Greggory J. Savage (Co. Reg. No. 22944)

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